Filed 4/24/12 In re A.S. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.S. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. R.S., Defendant and Appellant.	E053316 (Super.Ct.Nos. J233597 & J233598) OPINION

APPEAL from the Superior Court of San Bernardino County. Barbara A. Buchholz, Judge. Affirmed.

Hassan Gorguinpour, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, Kristina M. Robb and Jamila Bayati, Deputy County Counsel, for Plaintiff and Respondent.

Father, Robert S., appeals from the denial of his petition to modify the jurisdictional and dispositional orders (Welf. & Inst. Code,[1] § 388), seeking to set aside the judgment, which was made in his absence, on the ground he was informed by the San Bernardino County Children and Family Services (CFS) worker that he would be able to participate in those hearings by telephone. Because the court had declined to appoint counsel for him, he argued he was denied due process of law. One of father's stepdaughters, a teenager, alleged father had taken her to a motel and raped her, which resulted in the removal of father's two biological children and the initiation of the dependency. Father declined to be interviewed by CFS or to provide an address or to appear in person in court. Once it was clear that no criminal charges had been filed, he retained counsel and sought to set aside the prior orders. The trial court denied his section 388 petition and he appealed.

We affirm.

BACKGROUND

On June 1, 2010, A.C., age 14, reported sexual abuse by her stepfather (father of the minors involved in this appeal) in December 2009.[2] She also disclosed that on a

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[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

[2] A.C.'s father is not a party to this appeal, so all further references to "father" relate to the father of A.C.'s two half siblings

previous occasion, in October 2009, father had discovered a hickey on her neck and told her she needed to remove her shirt so that he could inspect the rest of her body for additional hickies, or else he would tell her mother. On this occasion, A.C. was made to stay in the bathroom naked for approximately two hours.

Regarding the current allegation, A.C. reported that sometime in December 2009, father informed her that he had received a telephone call from a man who claimed to have a videotape of A.C. having sex with a man and threatened to post it on the internet if father did not pay $2,000 or $3,000. A.C. could only think of one instance in which she had "hooked up" with a random male for sex and was unaware she was being videotaped.[3] Father told A.C. he did not have money to pay for the videotape so she would have to come up with it or he would have to tell her mother.

Because the alleged blackmailer wanted the money by New Year's Eve, father suggested that he knew a man who would pay them the amount of money they needed if A.C. would make another videotape of her having sex with an unknown male. Eventually A.C. agreed to the plan because she had caused enough grief for her family and her mother stemming from an incident that started in 2007 when she was in the 7th grade and lost her virginity.

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[3] A.C. admitted to numerous sexual encounters (too numerous to count) with numerous partners, not boyfriends.

Pursuant to the plan, prior to New Year's Eve, father drove himself and A.C. to a motel where father gave her Jack Daniels to drink before they went to a room where father sexually abused her. A.C. noticed a video camera set up in the room, which was one she recognized as belonging to father. The abuse consisted of oral copulation and digital penetration of both her vagina and anus, followed by sexual intercourse, accomplished while father restrained A.C.'s hands.

A.C. disclosed the abuse to her paternal grandparents in June 2010 because she had been punishing herself by using multiple illegal drugs, including methamphetamine, marijuana, OxyContin, and heroin, and wanted to stop. A law enforcement search of the family home resulted in the seizure of a laptop computer and several videocassettes and DVD's, but the record does not reveal the nature or content of the videocassettes. CFS filed a dependency petition alleging mother's failure to protect[4] (§ 300, subd. (b)), father's sexual abuse of A.C., the children's half-sibling (§ 300, subd. (d)), and sibling abuse. (§ 300, subd. (j).) The children were detained with their maternal grandparents.

Father did not appear at the detention hearing and his whereabouts were unknown. CFS was unable to serve father with the dependency petition because he had fled and he made no attempts to contact the social worker, although he was aware that the children were in protective custody through communications with the mother, who was

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[4] We deal here only with the petitions relating to father's biological children, S.S. and A.S.

uncooperative in the investigation of the abuse. When interviewed in June 2010, mother (who had also eluded the social worker) informed the social worker that she had been in contact with the father, but did not know how to contact him. CFS was informed father had fled to Mexico to avoid criminal prosecution and it obtained photographs of the family car crossing the border.

On August 10, 2010, mother appeared and requested a contested jurisdictional hearing. During that hearing, the court informed counsel that father had contacted the court via telephone, advised he was out of the country and had lost his passport. The court further relayed that father had requested that counsel be appointed to represent him, but the court denied the request. Before and after this hearing, father exchanged several emails with the assigned social worker and her supervisor.

On August 24, 2010, the court conducted a combined jurisdiction/disposition hearing. Father did not appear and there is no indication that father called the court on this date. Mother submitted on the petition after waiving her rights to a hearing and the court declared both children dependents of the court. Father, who was legally married to mother at the time of the children's conception, was declared the presumed father of his two children.[5] The court found the children came within section 300, subdivisions (b), (d), and (j), and were removed from the parents' custody. The court found that CFS had

[5] CFS's argument that father was merely an alleged father is not supported by the record.

made diligent efforts to locate the absent father. The court ordered no reunification services for father.

On January 24, 2011, father filed a petition to modify the jurisdiction/disposition orders on the ground of new evidence. (§ 388.) The order father sought to modify was the order placing his children with their maternal grandparents and denying father contact with the children.[6] The new evidence related to the fact that no criminal prosecution had been undertaken, and father had not been provided standing or an opportunity to address his interests due to the social worker's failure to inform the court that he had been in contact with CFS, despite the social worker's statements to the contrary. Father asserted he had called in to the court on August 24, 2010, and had been told by the social worker he would be "conferenced" in on the proceedings and was available to take the call. He sought visitation with his children, either supervised or unmonitored. The court set a nonevidentiary hearing on the petition.

In response to father's petition, CFS indicated that although father had called on a couple of occasions and had emailed CFS, he would not disclose his location. On July 26, 2010, father had informed CFS that he was not in the country, but provided an email address to be used to set up a telephone interview. When the social worker tried to contact father at the email address provided, the email address was not valid. On March

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[6] On appeal, father characterizes the modification petition as seeking to set aside the finding that he sexually abused A.C.

1, 2011, the previous worker had reported that father would call from unknown, untraceable numbers and that he would not leave a number or address where CFS could reach him. Father eventually provided a telephone number which the social worker called and left a message for father to call. CFS had telephone contact with father once in October 2010, and received messages from father on two other occasions, once in October 2010, and once in December 2010.

On April 11, 2011, the court conducted a hearing on the modification petition. Father did not appear, but was represented by retained counsel. The court denied the petition along with the request for an evidentiary hearing. Father appealed.

DISCUSSION

Father challenges the denial of his modification petition on the ground that CFS's actions in advising him he could appear telephonically, and the court's refusal to appoint counsel to represent him, violated his constitutional right to due process of law. We review the grant or denial of a petition for modification under section 388 for an abuse of discretion. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1228.)

Under section 388, a parent may petition the court to change, modify, or set aside a previous court order on the grounds of changed circumstances or new evidence. (§ 388, subd. (a).) A section 388 motion is a proper vehicle to raise a due process challenge based on lack of notice. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189, citing *Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 481, 487-488.) We assume it is also an

appropriate vehicle for a parent to raise a due process challenge based on the court's failure to appoint counsel to represent him or her.

Due process requires that a parent is entitled to notice that is reasonably calculated to apprise him or her of the dependency proceedings and afford him or her an opportunity to object. (*In re Justice P., supra*, 123 Cal.App.4th at p. 188; *In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1418.) The child welfare agency must act with diligence to locate a missing parent. (See, e.g., *David B. v. Superior Court* (1994) 21 Cal.App.4th 1010, 1016.) Reasonable diligence denotes a thorough, systematic investigation and an inquiry conducted in good faith. (*In re Arlyne A.* (2000) 85 Cal.App.4th 591, 598-599.)

There is no due process violation when there has been a good faith attempt to provide notice to a parent who is transient and whose whereabouts are unknown for the majority of the proceedings. (*In re Melinda J., supra*, 234 Cal.App.3d at pp. 1418-1419; see also *Mullane v. Central Hanover Bank & Trust Co*. (1950) 339 U.S. 306, 317 [94 L. Ed. 865, 70 S. Ct. 652] ["in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights"].)

Furthermore, where a parent has actively eluded service of process, the failure to physically serve the parent with a copy of the petition and notice of hearing is excusable under the disentitlement doctrine. (*In re Kamelia S.* (2000) 82 Cal.App.4th 1224, 1227-1228.) Because father was aware of the date, time, location, and nature of the proceedings, and because the failure to physically serve him with the written notice was

due to his flight from jurisdiction to evade service, there was no due process violation regarding notice or the opportunity to be heard.

The denial of father's telephonic request for counsel is another matter. Section 317, subdivision (a)(1) provides: "When it appears to the court that a parent or guardian of the child desires counsel but is presently financially unable to afford and cannot for that reason employ counsel, the court may appoint counsel as provided in this section." Subdivision (b) of this section provides: "When it appears to the court that a parent or guardian of the child is presently financially unable to afford and cannot for that reason employ counsel, and the child has been placed in out-of-home care, or the petitioning agency is recommending that the child be placed in out-of-home care, the court shall appoint counsel for the parent or guardian, unless the court finds that the parent or guardian has made a knowing and intelligent waiver of counsel as provided in this section." It has long been held that due process requires appointment of counsel for indigent noncustodial parents accused of neglect if indigency is demonstrated and appointment of counsel is requested. (*In re Jay R.* (1983) 150 Cal.App.3d 251, 260.)

In *In re Ebony W.* (1996) 47 Cal.App.4th 1643, the reviewing court held that counsel need not be appointed for an indigent parent in a dependency case until the parent appears in court and makes his or her desire for counsel known. (*Id.* at pp. 1647-1648.) When an indigent parent does not appear at a proceeding and does not otherwise communicate a desire for representation, the court is under no duty to appoint counsel to represent that parent. (*Id.* at p. 1648.) When the parent chooses to be absent from the

proceedings and has made no request for counsel, there is no obligation to appoint counsel. (*Id.* at p. 1645.)

Our research has disclosed no cases involving the hybrid situation presented here, where the parent voluntarily absented himself from the proceedings, but did communicate his desire for representation by counsel at the August 10, 2010, hearing. In our opinion, the court should have appointed counsel to represent the father since he had indicated a desire for representation. Although the reviewing court in *Ebony W.* impliedly held that a parent must appear, the statute does not require that a parent be personally present in order to make the request, nor does it require that a parent be personally served with process to be entitled to representation. To the contrary, such an interpretation would prevent many parents from receiving representation where they are unable to physically appear in court. We observe that section 317 expressly refers to a parent's inability to afford counsel in connection with the court's duty to appoint an attorney, and that father presented no evidence of his financial inability to obtain counsel in his section 388 petition. The court did not possess information that father had the financial ability to obtain counsel on his own. The better practice would be to appoint counsel for a nonappearing parent who requests representation.

The denial of counsel does not necessarily mean that the order denying the modification petition was an abuse of discretion, however. The right to counsel in dependency proceedings is a statutory right. (*In re Malcolm D.* (1996) 42 Cal.App.4th 904, 914.) The violation of a parent's *statutory right* to counsel in dependency

proceedings is reviewed under the standard set out in *People v. Watson* (1956) 46 Cal.2d 818, 836.[7] (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252-1253; *In re Ronald R.* (1995) 37 Cal.App.4th 1186, 1195.) To determine whether a parent had a due process right to representation we look to see whether the presence of counsel would have made a "determinative difference" in the outcome of the proceeding and if the absence of counsel rendered the proceedings fundamentally unfair. (*In re Claudia S.* (2005) 131 Cal.App.4th 236, 251; see also *Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 33 [101 S.Ct. 2153, 68 L.Ed.2d 640].)

Based on the matters asserted in father's section 388 petition, it is not "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson, supra*, 46 Cal.2d at p. 836.) Taking as true father's allegations that the social worker suppressed evidence that she had been in contact with father via telephone and email, that A.C. suffered from emotional or behavioral problems, that criminal charges had not been filed, or that A.C.'s father was

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[7] At oral argument, father's counsel urged us to find that the lack of counsel constituted structural error, mandating reversal. However, the right to counsel in dependency is limited by statute to indigent parents and there is no indication in the record that father was indigent. Structural errors involve "'basic protections, [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310 [111 S.Ct. 1246, 113 L.Ed.2d 302].) The structural error doctrine is not imported wholesale into the different context of dependencies, given the significant differences between criminal proceedings and dependency proceedings. (*In re James F.* (2008) 42 Cal.4th 901, 915-916.)

lying about father's record, none of these facts undermine A.C.'s allegations of rape at the heart of the dependency.

In any event, father lacked standing to directly challenge the allegations of rape by A.C., because he was not a party to A.C.'s dependency petition. Thus, the true findings that he sexually abused her would not be affected, even if he challenged them in the sibling petitions involving his own children. Because father had notice of the hearing date and time and had the opportunity to attend the hearing to challenge the evidence in the petition relating to his own children, and volitionally absented himself from that proceeding, we apply the harmless error standard of review.

The evidentiary items father attempted to refute in his declaration do not undermine the court's finding that the children were in need of protection. The information set forth in father's section 388 petition was well known to father prior to the jurisdiction hearing, as evidenced by statements made in his email correspondence, and does not constitute new evidence. (See *In re H.S.* (2010) 188 Cal.App.4th 103, 109 [new expert's opinion based on evidence available at time of trial, which could have been presented with due diligence, is not new evidence].) Father did not provide authority to support the notion that a showing that a finding of sexual abuse requires proof of a criminal prosecution, so it is irrelevant that no charges have been filed (or pursued) against father. Father has not demonstrated how the result of the jurisdictional and dispositional findings and orders would have been different if counsel had represented

him at the hearing. There is no likelihood that a result more favorable to father would have been reached in the absence of the error.

Even if we determined that the lack of counsel constituted a due process violation, and measured the error under the federal constitutional standard (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]), we would conclude that any error was harmless beyond a reasonable doubt. Father's petition made oblique references to the denial of his right to address his interests but never states what new information evidence would have been presented if the court had appointed counsel to represent his interests other than his opinion that A.C. is untruthful and promiscuous. That does not mean she was not raped.

Even if the social worker was not candid in reporting contacts with father, it does not follow that she misrepresented the evidence found in her investigation of the allegations of A.C.'s molestation. The social worker's reports which were admitted into evidence at the jurisdictional hearing supported true findings on all allegations of the petitions. Once the juvenile court made a finding under section 300, subdivision (d) that A.C. had been sexually abused, the court was authorized to deny services and visitation. (§ 361.5, subd. (b)(6) [denial of reunification services]; *In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1008 [denial of visitation to a parent found to have sexually abused a minor if visitation would be harmful to the child's emotional well-being].)

Because the petition did not establish new evidence justifying a modification, the court did not abuse its discretion in denying the modification petition seeking visitation.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P.J.

We concur:

RICHLI
J.

MILLER
J.